SUBJECT INDEX

Page

Interest of amicus curiae 1

Statement of the case 2

Commonwealth of Kentucky: case in chief 5

William L. Austin: the defense 9

Commonwealth of Kentucky: rebuttal 19

Summary 20

Argument 26

I.

The people's burden of proof on "scienter" described in Section 436.100 of the Kentucky Revised Statutes and construed by the courts of the Commonwealth of Kentucky satisfies the constitutional requirement established in Smith v. California 26

A. The construction of Section 436.100 of the Kentucky Revised Statutes adopted by the courts of the Commonwealth of Kentucky, i.e., that the scienter requirement is "knowledge of the contents and character" is binding on this court 26

B. Proof of specific intent and "subjective" knowledge is not constitutionally compelled by Smith v. California. Mishkin v. New York instructs us that "objective" knowledge of the content and character of the materials, being synonymous with reckless conduct, meets the Smith requirements 28

Page

1. An analysis of the defendant's state of mind in relation to the mental element of "knowledge" 28

2. The scope of the "mental element" established in Smith v. Calif. 31

3. Miskin v. N.Y. holds awareness of content and character of material, being synonymous with reckless, meets Smith requirements 39

C. The Kentucky standard, "knowledge of the contents and character" of the magazines satisfies the constitutional requirement, established in the Smith case and clarified by Mishkin, being the equivalent of the test employed by the New York Courts in the latter case 42

II.

The prima facie presumption of Section 436.100-(4) of the Kentucky Revised Statutes as construed and applied by the courts of the Commonwealth of Kentucky did not deprive petitioner of any of his constitutional rights 44

A. The prima facie presumption is rationable and reasonable 44

B. Petitioner has no standing to attack the application and provisions of Section 436.100(4) which are not involved in this appeal 48

III.

Page

The court's refusal to instruct the jury that they must acquit the petitioner if they found he had a "good faith belief" was not an abridgment of his constitutional rights 49

A. The excuse of "good faith belief" is not, and should not be made, a constitutional requirement of the obscenity crime 49

1. The paramount right of government to regulate matters relating to sexual morality 51

2. The public policy of this court has always championed the obscenity laws .. 55

3. Rosen v. U.S., is strong precedent against such a proposition 58

4. The implications of Rosen being overruled are frightening 60

B. The instruction requested by petitioner was improper under "good faith belief" defense for the mental element prescribed by the Kentucky Statute. It failed to instruct the jury that reasonable grounds for the belief were also required 63

C. The evidence which was excluded was inadmissible on the grounds offered 64

IV.

Standards and criteria for reviewing the state court judgment 65

Conclusion 70

TABLE OF AUTHORITIES CITED

Cases	Page
A Quantity of Books v. Kansas, 378 U.S. 205, 12 L. Ed. 2d 809, 84 S. Ct. 1723	50
Austin v. Commonwealth of Kentucky, 386 S.W. 2d 270	2, 20, 27
Beauharnais v. Illinois, 343 U.S. 250, 72 S. Ct. 725, 96 L. Ed. 919	57
California v. Alberts, 354 U.S. 495, 1 L. Ed. 2d 1498, 77 S. Ct. 1314	21, 34, 35, 39, 51, 53, 55, 57, 59, 60, 61
California v. Campise, 51 Cal. Rptr. 815	70
California v. Culbertson, 51 Cal. Rptr. 827	70
California v. Harris, 192 Cal. App. 2d 887, 13 Cal. Rptr. 642	69
California v. Smith, 161 Cal. App. 2d 860, 237 P. 2d 636	32, 33, 34
California v. Williamson, 207 Cal. App. 2d 839, 24 Cal. Rptr. 734 cert. den. 377 U.S. 994	69
Chaplinski v. New Hampshire, 315 U.S. 568, 86 L. Ed. 1031, 62 S. Ct. 766	56, 57
Chicago v. Doe, 47 App. 2d 460, 197 N.E. 2d 711	70
Chobot v. Wisconsin, 12 Wisc. 2d 110, 106 N.W. 2d 286	68, 69
Commo Pennsylvania v. Levan, 52 Berks. 160	68
Commonwealth v. Sharpless, 2 S and R. 91, 7 Am. Dec. 632 (1815)	53
Conn v. Andrews, 150 Conn. 92, 186 A. 2d 546	69
Conn v. James J, Onorato, 2 Conn. 428, 199 A. 2d 715	68

Page

Connecticut v. Andrews, 150 Conn. 103, 186 A. 2d 546 ..... 47, 70

General Trust Company v. Blodgett, 287 U.S. 509 ..... 27, 35

Ginzburg v. United States, 16 L. Ed. 2d 31 ..... 53, 58, 60

Goldstein v. Virginia, 372 U.S. 910, 83 S. Ct. 726, 9 L. Ed. 2d 720 69

Harold S. Kahm v. United States, 300 F. 2d 78 cert. den. 369 U.S. 859, 82 S. Ct. 949, 8 L. Ed. 2d 18 69

Harris, In re, 366 P. 2d 305 69

Illinois v. Sikora, 204 N.E. 2d 768 70

Jacobellis v. Ohio, 378 U.S. 184, 12 L. Ed. 2d 793, 84 S. Ct. 1676 ..... 25, 67

Kingsley Books Inc. v. Brown, 354 U.S. 436, 1 L. Ed. 2d 1469, 77 S. Ct. 1325 66

Kingsley Pictures Corporation v. Regents, 360 U.S. 684, 3 L. Ed. 2d 1512, 79 S. Ct. 1362 ..... 27, 35

LeRoy v. Sedley, 1 Sid. 168, 82 Eng. Reprint 1036 (1663) 53

Mahon v. Rachleff, 15 Fla. Supp. 136 aff'd 124 So. 2d 878 68

Minnesota v. Oman, 261 Minn. 10, 110 N.W. 2d 514 47

Mishkin v. New York, 383 U.S. 502, 16 L. Ed. 2d 56, 86 S. Ct. 958 ..... 20, 21, 28, 39, 41, 42, 53, 60

Missouri v. Vollmar, 389 S.W. 2d 20 70

Monfred v. Maryland, 226 Md. 312, 173 A. 2d 173, cert. den. 368 U.S. 953, 82 S. Ct. 395, 7 L. Ed. 2d 386 69

Page

Mugler v. Kansas, 123 U.S. 623 51

Nash v. United States, 229 U.S. 373 59

Near v. Minnesota, 283 U.S. 697, 51 S. Ct. 625, 75 L. Ed. 1357 .....56, 57

Nebraska v. Jungclaus, 176 Neb. 641, 126 N.W. 2d 858 .....46, 47, 70

New Jersey v. Hudson County News Co., 41 N.J. 247, 196 A. 2d 225 .....47, 68, 69, 70

New York v. Finkelstein, 11 N.Y. 2d 300, 229 N.Y.S. 2d 367, 183 N.E. 2d 661, cert. den. 371 U.S. 863, 83 S. Ct. 116, 9 L. Ed. 2d 100 ....21, 40, 69

New York Times Co. v. Sullivan, 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710 66

Ohio v. Mazes, ... Ohio St. ..... (July 13, 1966) 70

People v. Birch All-State News et al., 269 N.Y.S. 2d 752, rev. 40 Misc. 2d 626, 243 N.Y.S. 2d 525 .....67, 68

People v. Finkelstein, 9 N.Y. 2d 342, 174 N.E. 2d 470 .....21, 40, 42, 47

Rex v. Curl (1727) 2 Strange 788 53

Rosen v. United States, 161 U.S. 29 ....22, 24, 44, 45, 46, 55, 57, 58, 59

Roth v. United States, 354 U.S. 476 ....22, 24, 44, 51, 52, 53, 55, 57, 59, 60, 61

Schindler v. United States, 208 F. 2d 289, cert. den. 347 U.S. 938 62

Smith v. California, 361 U.S. 147, 80 S. Ct. 215, 4 L. Ed. 2d 205 .....20, 21, 28, 31

State v. Miller, 145 W. Va. 59, 112 S.E. 2d 472 47

Page

Trist v. Child, 21 Wall. 441 51

Tyomies Publishing Co. v. United States, 211 Fed. 385 59

United States v. Dennett, 39 F. 2d 564 57

United States v. Kennerley, 209 Fed. 119 66

United States v. Raines, 362 U.S. 17 .....48, 49, 66

United States v. Roy A. Oakley, 290 F. 2d 517 cert. den. 368 U.S. 888, 82 S. Ct. 139, 7 L. Ed. 2d 87 reh. den. 368 U.S. 936, 82 S. Ct. 358, 7 L. Ed. 2d 198 69

United States v. Samuel R. Hochman, 277 F. 2d 631, cert. den. 364 U.S. 837, 81 S. Ct. 70, 5 L. Ed. 2d 61 reh. den. 364 U.S. 906, 81 S. Ct. 231, 5 L. Ed. 2d 199 69

United States v. West Coast News Co. et. al., 357 F. 2d 855 .....24, 59

Zeitlin v. Arnebergh, 59 Cal. 2d 930, 383 P. 2d 152, 31 Cal. Rptr. 800 61

Dictionary

Webster's Collegiate Dictionary, Fifth Edition 43

Statutes

American Law Institute, Model Penal Code, Sec. 2.04(1) 64

American Law Institute, Model Penal Code, Sec. 207.10 66

American Law Institute, Model Penal Code, Sec. 251.4(2) 41, 45

Page

American Law Institute, Model Penal Code (1957), Sec. 2.02(2)(c) 37

American Law Institute, Model Penal Code (1957), Sec. 2.04 37

Kentucky Revised Statutes, Sec. 436.100 65

Kentucky Revised Statutes, Sec. 436.100(2) 26, 27, 49

Kentucky Revised Statutes, Sec. 436.100(4) 26, 27, 47, 49

Kentucky Revised Statutes, Sec. 436.101 ..... 65, 66

New York Penal Law, Sec. 1141 42

United States Constitution, First Amendment 2, 50

United States Constitution, Seventh Amendment 24, 26

United States Constitution, Ninth Amendment 50

United States Constitution, Tenth Amendment 50

United States Constitution, Fourteenth Amendment 50

Textbooks

4 Blackstone on Commentaries, p. 64 53

63 Columbia Law Review, pp. 669, 671 53

52 Harvard Law Review (1939), p. 905 29

Perkins on Criminal Law, p. 684 29

Perkins on Criminal Law (1957), p. 806 64

Witkin, California Evidence, p. 74 46

IN THE

Supreme Court of the United States

October Term, 1966
No. 16

WILLIAM L. AUSTIN,

Petitioner,

vs.

COMMONWEALTH OF KENTUCKY,

Respondent.

On Writ of Certiorari to the McCracken Circuit Court of McCracken County, Commonwealth of Kentucky.

Brief Amicus Curiae of Citizens for Decent Literature Inc., an Ohio Corporation, in Support of Respondent.

Interest of Amicus Curiae.

Citizens for Decent Literature, Inc., an Ohio Corporation, with local affiliates throughout the United States is a non-profit, non-sectarian and non-political corporation with national headquarters in Cincinnati, Ohio, formed for and dedicated to the cause of good, decent and wholesome literature with a view to oppose and eliminate obscene literature, by cooperating with law enforcement in the enforcement of the laws. For the Court's convenience *amicus curiae* is hereinafter referred to by the single short title, CDL.

CDL believes that there exists a growing flood of publications, purposely designed and manufactured with a sensationalized appeal to prurient interest, that threatens to overthrow the basic morality upon which our nation and our Constitution were founded; that while the First Amendment of our Constitution has, from the time of our nation's founding, been construed to afford no protection to such publications, a loud voice is now being heard in the courtroom advocating the overruling of this "balancing of interest" interpretation in favor of an absolutist approach, aimed at nullifying the nation's basic obscenity laws.

At its national convention in Chicago during October of 1963, the national organization of Citizens for Decent Literature adopted a policy aimed at giving increased support in the fight against "obscenity," through legal advocacy in the courtroom in support of the people's case.

William L. Austin v. Commonwealth of Kentucky, is a case of nationwide importance which will have a serious effect on enforcement of the obscenity statutes throughout the nation.

Statement of the Case.

Petitioner William L. Austin is both a wholesale and retail news distributor. His wholesale news distributorship business services approximately 300 towns with periodicals, paperback books, comic and children's items, bibles, and anything in the general appeal reading field, including girlie magazines like High Heels, Vol. 2, No. 6 and Spree, Vol. 1, No. 38, from agencies in Shellyville, Tennessee; Jackson, Tennessee; Nashville, Tennessee; Carbondale, Illinois and Paducah, Kentucky. [R.

27, 28, 37; Commonwealth Exs. 1, 2.] His Paducah distributorship, Basin News Company, services southeastern Missouri from Cape Girardeau south to Poplar Bluff.

In Paducah, Kentucky, petitioner has operated his wholesale distributorship, Basin News Company, since 1946, and for the last 12 years has also owned and operated a large retail bookstore and newsstand known as Readmore Newsstand located on North Fifth Street between Kentucky and Broadway. [R. 6, 28, 38.] At the Readmore Newsstand he sells books, technical books, religious books, children's books and girlie magazines like High Heels, Vol. 2, No. 6, and Spree, No. 38 at retail. [R. 7, 28, 29, 35; Commonwealth Exs. 1, 2; Deft. Exs. 2, 3] he received from his wholesale distributorship Basin News Company in Paducah.

In May of 1963, a Committee on Moral and Social Welfare of the Ministerial Association, naming among its members the minister of the First Presbyterian Church, the minister of Trinity Baptist Church, and the minister of St. James A.M.E. Church, met with the petitioner and his son in the First Christian Church. [R. 22.] The Committee told petitioner that complaints had come to them as pastors, through the Committee of the Paducah Area Ministerial Fellowship and that they were interested in ascertaining the rules or standards he was maintaining in his store. [R. 24.] They talked about obscene literature in general and about a particular class of magazines, the girlie magazine. [R. 23.] The Committee illustrated what they were talking about by the use of two magazines. [R. 24.] They spoke in general terms and mentioned only one title: [R. 41.]. Petitioner indicated that there were many of this type

of magazine that he had cleated or stapled together so that they could not be thumbed through by either teenagers or adults. [R. 24.] Petitioner didn't make any commitment but promised them if they would let him know *what the magazine was* that he would look at *it* and give *it* his attention. [R. 25.] He agreed to withdraw any *magazines that the group found objectionable.* [R. 26.]

Following this discussion, petitioner removed the girlie magazines (25 to 30 titles) to a rack behind the cashier's stand where they had to be asked for by name. [R. 41.]

On September 28, 1963, Mrs. Kathleen Wathen, a private citizen from Paducah, Kentucky, visited Readmore News Agency and observed that the girlie magazines were segregated behind the counter. [R. 28.] She asked for High Heels, Vol. 2, No. 6 and Spree, No. 38 by name, having been given one name by a Mr. Copeland, and having seen earlier editions of another magazine at a person's house. [R. 7, 12.] Petitioner's employee sold her the magazines which were stapled shut. Only the girlie magazines which were behind the cashier's stand were stapled shut. [R. 8, 15.] Earlier in the summer she had purchased another magazine of the same type. At that time they were in the open. [R. 11.]

On October 11, 1963, Mrs. Wathen swore out a complaint alleging that on September 28, 1963, the petitioner:

> "Did unlawfully with knowledge of the contents or character sell, offer to sell, have in possession with intent to sell and offer to sell two magazines, to wit: Volume 1, No. 38 of a publication known as 'Spree', and Volume 2, No. 6 of a publication

known as 'High Heels', both of said publications being obscene and containing obscene pictures and writings or printed material of an indecent character."

and filed the same in the Quarterly Court of McCracken County, Commonwealth of Kentucky. [R. 1, 2.] On the same date, Judge Roy Stewart, Judge of McCracken County Court considered the complaint and issued a summons commanding the petitioner to appear at a formal hearing in the McCracken County Court on October 14, 1963. [R. 2.]

The case came on for trial before a trial commissioner and a jury sitting in the Quarterly Court of McCracken County, Kentucky. The jury found petitioner guilty as charged and fixed the punishment at a fine of $100. [R. 3.] Petitioner appealed to the Circuit Court of McCracken County, Kentucky, where on February 28, 1964, in accordance with Kentucky Criminal Procedure, the case was tried *de novo* to a second jury before the Honorable C. Warren Eaton, Judge of the McCracken Circuit Court. [R. 3, 4, 5.]

Commonwealth of Kentucky: Case in Chief.

It was stipulated by the parties that the defendant William L. Austin was the owner and operator of Readmore Newsstand on September 28, 1963, prior to and since that time.

Katherine Wathen, a resident of Paducah, testified that she was in the Readmore Newsstand on September 28, 1963, at which time she asked the saleslady for four specific magazines. [R. 6, 7.] She was informed that the store was "out of two of them" and was given High Heels, Vol. 2, No. 6 [Commonwealth Ex. 1] and Spree

No. 38 [Commonwealth Ex. 2], which she purchased for $1.00 each plus tax. [R. 7.] She described the layout of the store as having book shelves of paperback books, magazine racks filled with magazines and places for cards, postcards, occasional cards and newspapers. Spree and High Heels were on a rack behind the cashier's stand. Purchasers could see the magazines but had to ask for them by name. These were segregated from other magazines which were accessible to everyone. [R. 8.]

Mrs. Wathen testified that in the trial below the petitioner has testified that Readmore Newsstand had gotten the girlie magazines Spree and High Heels from Basin News Company, owned by the petitioner. [R. 10.]

On cross-examination by the defense attorney, Mrs. Wathen testified that she had been to Readmore Newsstand in the early summer of 1963 "approximately twice" and had purchased magazines "of this type" at that time. [R. 11.] At that time the magazines were out in the open and were not behind the counter. She stated that she had gotten the name of one of the magazines from a Mr. Copeland in Mayfield and had seen an earlier edition of the other magazine at someone's house. She had thumbed through Cavalier and Dude but did not consider them as bad as these two. [R. 12.] She denied that an organization known as Citizens for Decent Literature had furnished her the names of the magazines. She said she did not belong to a censorship organization known as Legion of Decency. [R. 13.] Mrs. Wathen stated that the magazines behind the cashier's stand were stapled but the other magazines were not. [R. 15.] She had not personally made any complaints to Mr. Austin and had not furnished Mr. Austin or his

employee with a list of magazines or books that she considered obscene but she said she knew the ministers had presented Mr. Austin with the names of some that they objected to. [R. 14.] She said that she had called Mrs. McWaters to tell her that she was going to make the purchase and would like for her to be present while she was there. [R. 15.] She stated that she was present at the trial below and had heard Mr. Austin testify that he did not know these two magazines were there but that she did not believe him. [R. 16.]

On redirect examination by the Commonwealth attorney Mrs. Wathen testified that she had heard Mr. Austin testify in the trial court below that there had been complaints from the ministers of children reading and buying those magazines, that they had asked him to please do something about them and that he (Mr. Austin) had built the rack and put these stapled magazines behind the cashier's stand. [R. 17.]

On recross-examination by defense attorney, Mrs. Wathen said that her testimony as to what was said in the trial below was as to her knowledge, as far as she could remember and that she could not remember word for word. [R. 18.]

Mrs. Patsy McWaters, a resident of Paducah, Kentucky, testified that Mrs. Wathen had called her on September 28, 1963, and asked if she would come down to Readmore Newsstand. She said she went down and observed Mrs. Wathen make the two purchases. [R. 19.]

On cross-examination by the defense attorney Mrs. McWaters said she had been to the Readmore Newsstand a number of times both before and since September 28, 1963. She stated that she and Mrs. Wathen belonged to the Catholic church. [R. 20.]

On redirect examination by the Commonwealth attorney, Mrs. McWaters testified that neither she nor Mrs. Wathen belonged to an organization known as Citizens for Decent Literature. [R. 20.]

Reverend Herbert Simpson, pastor of the First Christian Church in Paducah, testified that in May of 1963 he was chairman of the Ministerial Association Committee on Moral and Social Welfare and that among its other members were the minister of the First Presbyterian Church, the minister of Trinity Baptist Church, and the minister of St. James A.M.E. [R. 21, 22.] At that time a meeting was held in the First Christian Church with the petitioner and his son who were there by invitation. The matter of obscene literature had been discussed at a previous meeting and the meeting had been arranged so that Mr. Austin could speak to the entire committee. [R. 22.] During the meeting the committee mentioned to the petitioner that complaints had come to them as pastors through this Committee of the Paducah Area Ministerial Fellowship and that they were interested in ascertaining the rules or standards he was maintaining at his store, which was why the committee had him before them. [R. 24.] Reverend Simpson stated that the committee talked about obscene literature in general and about a particular class of magazine, the "girlie magazine". [R. 23.] He stated that the petitioner indicated that "there were many of this type of magazines that he had cleated or stapled together so that they could not be thumbed through by either teenagers or adults". [R. 24.]

On cross-examination by the defense attorney Reverend Simpson stated that the organization did not specifically name any magazine but that they illustrated

what they were talking about by the use of two magazines. He stated that their complaint was not altogether about a fear that minors would get hold of the material, which was the complaint which they had been receiving from parents, but that they were concerned with obscenity in general. [R. 24.] Asked how long he had belonged to the CD(A)L, he answered "within the (last) month". [R. 24.] He stated he didn't recall the petitioner making any commitment, but that the petitioner told them to call his attention to anything which came to hand that they considered obscene [R. 25] and admitted that the petitioner did agree to withdraw "any magazine that you named that you found objectionable" [R. 26.]

The Commonwealth of Kentucky rested its case.

William L. Austin: The Defense.

The defendant William L. Austin testified that he was in the wholesale news distributor business having agencies in Shelbyville, Tenn., Nashville, Tenn., Jackson, Tenn., Carbondale, Ill., and Paducah, Ky., the latter agency serving southeastern Missouri from Cape Girardeau south to Poplar Bluff. [R. 27.] These agencies serviced all periodicals, paperback books, comics, and children's items, bibles and anything in the general appeal reading field, including girlie magazines, like Spree Vol. 38 and High Heels, Vol. 2, No. 6. [R. 28, 37.] He also owned and operated the Readmore Newsstand, a retail business in Paducah which sold hardback books, paperback books, technical books, religious books, children's books, newspapers and magazines, and girlie magazines like Spree and High Heels and was a member of the American Booksellers Association and

Christian Booksellers Association. [R. 29.] He stated that in a month's time the Readmore Newsstand handled approximately 3,000 titles of magazines, approximately 4,000 titles of hardback books, and approximately 4,000 titles of paperback books.

Asked what, if anything, he had done to attempt to regulate or limit the type of literature disposed, the petitioner stated that "we use the second-class permit quite a bit. We feel like a magazine that don't have a second-class permit maybe should be withheld from general distribution, but frankly, I can't see any difference in the ones that have and don't have." and "we have tried to use it as a barometer. We have not completely done so but we stay very close to that. At least we ask our publishers to recognize that." [R. 30.] Asked whether it would be possible for his concern to economically run an outfit like Readmore Newsstand and personally censor each of those ten of 12,000 titles, he answered, "It is impossible" before an objection to the question was sustained. His answer by avowal was "It would be almost humanly impossible to read everything we handle." An objection was sustained to the question, "Does the fact that a publication has the second-class permit of the public post office department mean that that publication has been approved as far as obscenity is concerned, as far as it being sent through the United States mail?" The answer by avowal was, "It means the post office has considered it fit to be mailed at the reduced rate of second-class [R. 31, 32]." Asked if he had any other policy at Readmore as far as the sale of objectionable material is concerned, he said "I remove from sale any publication that they feel is offensive to them or their representatives. All they have

to do is advise me what they wanted taken off." [R. 32.] He stated that he had asked certain groups for a list but that to date he had not been furnished any list for guidance [R. 33.] An objection was sustained to a question "Does the fact that a magazine does not have a second-class permit mean that it has been turned down by the Post Office Department, or does it mean that it hasn't been considered by the department?" His answer by avowal was, "It could mean either that they didn't apply or were refused". [R. 33.]

An objection was sustained when the defense attorney attempted to introduce a letter dated February 8, 1958, from the petitioner to Ray Kirk, president of All State News Company, Chicago, Illinois, the distributor of High Heels and Spree. [R. 34.]

The petitioner stated that the policy of the store before the magazines were removed behind the counter was to staple them because at the "suggestion of people and pastors, and people who thought they know what the community should have, that these magazines would be better displayed stapled, so we went to the expense of stapling them so no one could observe the contents of the magazines." and "not only did we staple these magazines, we stapled the hot rod magazines that are bought by the younger generation; we stapled some of our picture magazines that had eye-appeal but were just pictures and quickly examined, and that was the reason these magazines were stapled." [R. 34, 35.]

The petitioner identified photographs of the girlie magazine rack behind the cash register [Deft. Exs. 2, 3] and said that as far as he knew all of these magazines have the second-class mailing privilege. [R. 35, 36.]

Petitioner Austin testified that there had never been an objection as far as the community was concerned that they didn't observe and correct and adjust. He stated that there had never been an objection to any of the magazines by title and "that is what we wanted and asked for." [R. 36.] He stated that all of the girlie magazines shown on Exhibits 2 and 3 were distributed by his agency to approximately 300 towns serviced by his wholesale business distributorship. [R. 36.] An objection was sustained to the question whether those magazines had been banned or restricted by any governmental authority or community or group in any of the areas they were sold in. His answer by avowal was, "Not to my knowledge. There has been no general restriction on the sale of these magazines." [R. 37.]

Petitioner stated that he did not know, nor did anyone advise him that High Heels, Vol. 2, No. 6 and Spree, Vol. 1, No. 38 were on the stand and that he immediately removed them when he received the summons and had not sold them since. [R. 38.]

On cross-examination by the Commonwealth attorney, petitioner stated that he had been in the wholesale magazine selling business in Paducah since 1946, doing business as Basin News Company and had operated the retail store Readmore Newsstand for 12 years and was the owner and operator of both businesses. [R. 38.] He stated that Spree and High Heels were received from All State News Company by Basin News Company which made distribution to the various retailers, including Readmore Newsstand. He stated that when they reached his retail outlet, it was determined that they were called adult reading and placed in the segregated slots behind the checkout counter. [R. 39.]

Petitioner stated that on the occasion of the meeting with the ministers in May of 1963, objections were stated in a very general way, "They didn't specify any titles, they spoke in general terms. There was one title mentioned at the time, only one." He stated because of that meeting he "removed those magazines to behind the cash register, and there would never be any question at all about adults only buying them or seeing the magazine." About 25 to 30 titles were involved. [R. 41.]

Petitioner stated that he had heard of Spree, but he never knew of High Heels. [R. 41.] He stated that he considered the magazines were in poor taste but that he did not consider the two magazines obscene. Asked to read page 58 of Spree he said he did not consider that obscene. He considered that "clinical more than anything". [R. 42.] He said he read Playboy and considered Spree practically the same kind. [R. 43.] Asked if as a retailer he felt that he bore any responsibility to the community as to what he sold, he answered "I certainly do."

On redirect examination by the defense attorney, petitioner stated that in 1960 a complaint had been made about magazines such as Esquire, Cavalier, Dude, and Gent being near a school and that they were removed, although they were not objectionable in his mind. [R. 44.] He stated that because of his business activity he was in Paducah only about 30 per cent of the time. [R. 45.]

Mrs. Curelia Staudt testified that she had been employed as a clerk at Readmore for five years. [R. 45.] She stated that the magazines in evidence or magazines like them were moved behind the cash register because

Mr. Austin had said he had some complaints and wanted them moved there so they could see who bought them. She was instructed when she went to work there that they were not to sell them to anyone under 21 years of age. [R. 46.] She stated that the girlie magazines were not stapled now but that "at one time they had some of them stapled" to keep people from reading them the adult magazines, hot rod magazines, and car magazines had been stapled, that "they would stand there and leave through them" and "and never buy them". [R. 47.]

Mrs. Staudt stated she did not see Mr. Austin too often and that he came in about once a week. [R. 48.]

Wade Sherrill testified that he was a receiving clerk and general warehouse manager for Mr. Austin, Basin News Company, and had worked for him for approximately 9 years. [R. 49, 50.] He stated that Basin News Company received "close to a thousand different titles every month, and about a half million copies per month." He stated that the petitioner was hardly ever at Basin News Company and that they were lucky to see him every three weeks or 10 days. He stated that he had complete authority in the warehouse. [R. 49.] An objection was sustained to a question whether "you have any instructions or policy so far as distributing magazines that do not have second-class mailing permits". His answer by avowal was "We don't put any out that doesn't have second-class mailing permits. That is my instructions." [R. 49, 50.] An objection was sustained to the question whether it was "possible for your organization to check all of the publications you handle so far as what's in them and things of that kind." His answer by avowal was "It is impossible for us to

check everything. The only thing we check now is second-class mailings."

Asked by the Commonwealth attorney on cross-examination how long he had been "warehouse manager" he stated, "I will say about a year. I am warehouse manager when Bob Austin, Mr. Austin's son is out of town, and most of the time he is out of town here lately."

Dr. C. S. Lowry testified that he was employed at Murray State College at Murray, Ky., and had been for 40 years where he was now a professor and head of the department of social science; that he had a Bachelor of Arts degree, two Master of Arts degrees and one PhD degree. [R. 51.]

Dr. Lowry stated that "so far as I know, and I have made a very careful search, there has been no study made which establishes it to be a fact that this kind of literature has any adverse effect, and I might say, any good effect." [R. 53.] Asked by the court whether he was referring to society as a whole, he said, yes. An objection was sustained to a question whether or not there was an opinion in his field of study that "magazines of the so-called girlie magazine type serve a good purpose as an outlet for some people". His answer by avowal was "There is reason to believe that this kind of a material does have an effect to disgust one with sex." [R. 53.]

Dr. Lowry testified that "the purpose of the magazine in my opinion is to make money, and they use sex, just like they do in selling Camel cigarettes, as a come-on".

An objection was sustained to a question whether or not "this particular type of magazine and Playboy and

Dude and Cavalier, those types of magazines, are generally sold and accepted in Kentucky, West Tennessee, Southern Illinois, the entire area". His answer by avowal was "This type of magazine is sold very widely in this area." He then testified that this type of magazine has been sold in this entire area for a long number of years and accepted by the various committees and that "they have been sold and I have purchased, unfortunately, some during my—." [R. 55.] Asked what he meant by "unfortunately" he said "I mean by that that this is cheap stuff and unpleasant, and you don't like to deal with it, but since you are responsible for directing certain people, you are supposed to know what they consume by way of vision and reading and whatnot", [R. 56.] He stated that Spree and High Heels do not go as far beyond the customary limits of candor in the community as some which are generally accepted". [R. 56.] He stated that they would not create a desire or shameful or morbid interest in nudity or sex in the average person who might examine them but on the contrary "would seem to disgust one with the whole subject of sex, they are so cheaply and poorly done". [R. 56.] An objection was sustained to a question as to whether the pictures in the two magazines were any more revealing of the human body than pictures in other publications accepted by the various communities all over the country. Dr. Lowry then testified that in his opinion the articles in Spree were not unsavory, that two, "The New Boom in White Slavery" and "I Plotted Adolph Hitler's Murder" were somewhat educational on a pretty low level and were not objectionable and that the story "Double Date" was racy but was not obscene. [R. 57.] An objection was sustained to a

question as to whether the magazine stories go any further in its description of sex than various books or publications and whether an article in the current issue of Reader's Digest on sex went further. His answer by way of avowal was "There is an article which goes further than any article in this number of Spree or High Heels." [R. 58.]

On cross-examination by the Commonwealth attorney, Dr. Lowry stated that the magazines do not appeal to the prurient interest and that they appeal to "curiosity, on the part of some". Asked what he meant when he said the magazines were published to make money out of sex he said, "I said they use sex as a come-on to sell advertisements maybe, or something else. That is the way it is used in selling Camel cigarettes." He said he considered the books racy. [R. 60.]

On redirect examination by the defense attorney, an offer to introduce six books in evidence through the witness [Exs. 4 through 9] as having been sold and accepted in Western Kentucky and Western Tennessee was denied. The court ruled "We only have the two magazines on trial." [R. 61.]

James Apple testified that he was an attorney and associate of the defense attorney. An objection was sustained to the introduction into evidence of a record of the case "Sunshine Book Co. v. Summerfield," involving the nudist magazines Sunshine and Health and Sun. [Ex. 10.] The answer by avowal was that the U.S. Supreme Court, in sustaining the injunction in the *Sunshine Book Co.* case, prevented the Post Office Department from confiscating the magazines. An objection to a question as to whether the nudist magazines

there involved were more revealing was also sustained. The answer by avowal was, "The magazines in question are more revealing in that they show front views of both nude males and females." [R. 62.]

C. L. Werner testified that he was an investigator employed by the defense attorney. He said that he had gone to the Carnegie Library in Paducah and made copies of pictures in various publications and books. [R. 63.] An offer to introduce these photographs [Exs. 11 through 19] was refused as irrelevent. [R. 66.]

William L. Austin, the petitioner, was recalled by the defense attorney and asked with reference to All State News Company, the distributor of the two magazines in question, "How many other companies of that nature does the Basin News Company do business with?" The petitioner answered, "Well, of any nature, about 12 to 14 companies, with approximately 1,000 titles a month." He stated, "We have a blanket contract with these companies, we signed that, because it would be impossible for them to send us every publication and every book and ask us to review it and then give an order. We have a blanket arrangement with them and they ship us anything they happen to distribute or publish, and we never set our order, we don't tell them how many to send us, or how few to send us. They use their own judgment on figures and statistics they have for the order that they will send us. We never order a publication, it is automatically sent to us under blanket contract."

Commonwealth of Kentucky: Rebuttal.

Frederick G. Schlafer, testified that he was the pastor of the Baptist Tabernacle in Paducah; that he had a Bachelors Degree with a major in English and Social Science and that he had lived in Paducah for 5½ years and that as a part of his studies and work he made a study of the moral and social behavior of people. [R. 68.]

Dr. Schlafer testified that he felt he knew the contemporary community standards of the community. He stated that in his opinion both High Heels and Spree were "both obscene and indecent. They appeal basically to the baser nature of man and they cheapen womanhood. They are detrimental from the standpoint of degrading something that God intended to be holy and sacred and beautiful in the right context." He stated that a number of studies have been made through Congress and the state government regarding the effects of obscene literature on people. [R. 68-70.]

On cross-examination by the defense attorney Dr. Schlafer testified that Cavalier, Dude and Playboy were not similar to High Heels and Spree and that there was "quite a contrast". [R. 71.] He saw a difference in the reading material, particularly Spree. [R. 72.] He stated that on every page there was something offensive to the moral man or woman. [R. 75.] He stated that the descriptions and stories very definitely are worse than the 19th chapter of Genesis (Lot and his two daughters) and that "in the Scriptures this act is not glorified". [R. 76.]

Albert Jones testified that he was the Commonwealth attorney of the Second Judicial District and that pre-

vious to that he had been a Special Agent for the FBI for two years. He stated that he knew of studies made of obscene literature in relation to the behavior of man.

On cross-examination by the defense attorney he stated that he was assisting in the case and that as Commonwealth attorney it was part of his duties.

Following the court's instructions to the jury [R. 109] and arguments of counsel [R. 78-92], the jury returned a verdict of guilty on February 28, 1964 and assessed a fine of $250. [R. 94.] On March 5, 1964, the petitioner filed motions to set aside the jury verdict and for a new trial. [R. 111.] On March 9 the court overruled both motions. [R. 114.] On January 22, 1965, the Court of Appeals of Kentucky in a *per curiam* opinion in *Austin v. Commonwealth of Kentucky,* 386 S.W. 2d 270, with Chief Justice Moremen dissenting, overruled petitioner's motion for an appeal, noting "We find no error in the trial. . . ." A motion to reconsider was also overruled by the Court of Appeals.

Summary.

I.

The construction given by the Kentucky courts to the State statute, *i.e.,* that the scienter requirement is "knowledge of the contents and character" of the magazines is completely non-reviewable by this Court.

Petitioner's argument that this Court's decision in *Smith v. California* imposes a specific intent requirement misreads *Smith* and disregards the subsequent expressions in *Mishkin v. New York.*

To insure cohesiveness, a frame of reference must be drawn — that of the defendant's state of mind. The

state of mind spectrum which may exist "subjectively" in any person who has sold a book which is obscene as a matter of fact has five classes or degrees of "subjective" knowledge. Three are generally regarded as subjective knowledge and the last two, "objective" knowledge.

The scienter requirement came into the law in the *Smith* decision. In establishing a "mental element" it also left a void by not describing more completely what that requirement was. The Court's language, however, properly interpreted, indicated that subjective knowledge was not a requirement. This Court's reference to the California scienter requirement in *California v. Alberts*, the common law precedents and the Model Penal Code (1957 draft) approach seemed to indicate that "awareness of the contents and character" was the test, with an objective factor somewhere between ordinary negligence and recklessness.

The *Smith* decision left three areas undecided: (1) whether honest mistake need be a defense; (2) whether a *prima facie* presumption might shift the burden of going forward with the evidence, and (3) whether a *prima facie* presumption might shift the burden of proof.

The *Mishkin* case established "recklessness" as an acceptable scienter requirement, drawing a comparison between the Model Penal Code scienter version and the New York statute. That case clearly established the principle that there is no constitutional requirement which establishes "subjective" knowledge as the people's burden of proof.

Reading the New York statute in the light of the two *Finkelstein* cases, the test is "awareness of the contents plus awareness of the character of the material."

Taken together they spell out calculated, not innocent purveyance of filth.

The trial judge in the McCracken County Circuit Court gave essentially the same test to the jury to guide its deliberations. The standards therefore were correct.

II.

In 1896 in the *Rosen* case, the United States Supreme Court gave an instruction which made everyone using the mails chargeable with knowledge of decency, purity, obscenity, etc. In 1957, the *Roth* court cited this proposition as an answer to a claim that the obscenity statutes do not provide "reasonably ascertainable standards of guilt." It would appear that under *Rosen*, proof of the obscenity of the subject matter and proof of knowledge of the contents would function like a *prima facie* presumption, to show knowledge of the obscenity.

The *prima facie* presumption of the Model Penal Code arises from proof of possession, etc. This requires an additional inference, that a person knows the contents of what he possesses for sale, to compare with the *prima facie* presumption described by the *Rosen* decision. There is authority that the additional inference is reasonable and that the *prima facie* presumption in the Model Penal Code (1962) meets the test of constitutional due process, *i.e.*, a rational connection existing between the facts proved (possession for sale and that the subject matter is obscene) and the additional fact presumed (that the defendant was aware the subject matter was obscene).

The *prima facie* presumption of the Kentucky statute is the same as the Model Penal Code and the same rational relationship exists here also.

The Commonwealth in presenting their case in chief, did not resort to the statutory presumption; nor was reference made to it during the arguments to the jury. An examination of the people's evidence presented during their case in chief reveals a case supported by sufficient evidence without resort to the presumption.

The trial judge in his instructions made no reference to the presumption. In fact, at no place in the transcript is there any reference to it.

This Court should not inquire into the constitutionality of a statute (the presumption) in the abstract. Even were the presumption to be held unconstitutional, the same would not affect the conviction in this case which was effected solely under another section.

III.

The cases cited by petitioner wherein this Court has engrafted a stricter *"mens rea"* requirement into statutes which affect conduct in the free speech area, did not have the strong countervaling force present which exists here, *i.e.*, the public interest in rigid enforcement of the obscenity laws.

Petitioner's claim that the scienter standards must be "subjective" is in opposition to the people's claim that they must be "objective", if the social evil is to be controlled. The controversy thus framed, places in the balance two opposing forces; free speech and the police power. In weighing the balance, *amicus* underscores the relative right of the government to regulate matters relating to sexual morality.

The public interest in good public morality relating to the sex function is paramount.

The public policy of this Court has always championed the obscenity laws.

Rosen v. U.S. holds that "subjective" knowledge of obscenity is irrelevant and "good faith belief" is no defense. This Court in the *Roth* case considered the *Rosen* case valid precedent. Recently the Sixth Circuit Court of Appeals has relied on it in affirming *United States v. West Coast News Co., et al.*

The implications of *Rosen* being overruled are frightening. The result would be to turn past confusion into a weapon of destruction against the people's cause.

The "good faith belief" instruction requested by petitioner was erroneous for failing to instruct the jury that reasonable grounds for the belief were also required.

The evidence which was excluded by the trial court was inadmissible on the grounds offered.

This Court should consider the following standards and criteria in reviewing the state court judgment: Petitioner was convicted in a jury trial under procedures which accord the maximum safeguards to personal liberty. The Seventh Amendment is operative here, according special importance to jury determinations.

This Court should disregard the *prima facie* presumption provision. It was not involved in the case and has since been repealed along with the other obscenity sections which were replaced during the 1966 Session by a new obscenity statute. The presumption provision has no future application.

Assuming this Court sustains the scienter provision, the remaining question relates to the standards and criteria to be followed in applying the law to the facts. The Court has a proper role and the jury has a proper role. This Court's inquiry should be as to whether a jury issue is presented from the facts. If it is, then a "sufficient evidence" standard should be applied in accordance with Justice Warren's views in *Jacobellis*.

The petitioner is no neophyte. His experience qualifies him as an expert. The reputation of Spree, All State News, etc. are well known. His reckless conduct is apparent.

The Independent Distributors could do much to assist the communities in getting rid of obscene materials, but they prefer non-involvement. Petitioner wanted the name of each issue which was objectionable, so that he might take action on one magazine only.

Petitioner was not taken by surprise. The community action throughout the nation is a matter of wide knowledge. He chose to "see no evil, hear no evil, speak no evil".

In the seven years since the *Smith* case, state and federal appellate courts have found no difficulty in affirming convictions based on objective knowledge and circumstantial evidence of less weight than in this case.

ARGUMENT.

I.

THE PEOPLE'S BURDEN OF PROOF ON "SCIENTER" DESCRIBED IN SECTION 436.100 OF THE KENTUCKY REVISED STATUTES AND CONSTRUED BY THE COURTS OF THE COMMONWEALTH OF KENTUCKY SATISFIES THE CONSTITUTIONAL REQUIREMENT ESTABLISHED IN SMITH V. CALIFORNIA.

A. The Construction of Section 436.100 of the Kentucky Revised Statutes Adopted by the Courts of the Commonwealth of Kentucky, i.e., That the Scienter Requirement Is "Knowledge of the Contents and Character" Is Binding on This Court.

Subsections (2) and (4) of Section 436.100 of the Kentucky Revised Statutes read in part as follows:

> (2) Any person who, with knowledge of the *contents or character,* sells, lends, etc. . . . any obscene book, magazine, etc. . . . shall be fined. . . . (Our emphasis.)
>
> (4) The sale, loan, etc. . . . of any book, magazine, etc. . . . found to be obscene, shall be *prima facie* evidence that the seller . . . had knowledge of the obscene character of the printed matter, picture. . . .

In construing the above statute, trial judge C. Warren Eaton of the McCracken Circuit Court instructed the jury as follows in regard to the scienter issue:

> "If the jury believes from the evidence in this case beyond a reasonable doubt that the defendant Wil-

liam L. Austin *had knowledge of the contents and the character of said magazines* . . . you will find the defendant guilty as charged. . . ." (Our emphasis.)

It should be observed that, in interpreting the phrase "contents or character" as employed in subsection (2), the trial judge must have taken note of the statutory language used in subsection (4) and concluded that the phrase meant *contents and character.* The court's interpretation was little more than an application of the general rule that laws *pari materia* must be construed with reference to each other.

The Commonwealth of Kentucky Court of Appeals put its stamp of approval upon this construction of the statute when in *William L. Austin v. Commonwealth of Kentucky,* ..... Ky. ....., 386 S.W. 2d 270, decided January 22, 1965, it denied petitioner's application for an appeal and held, "We find no error in the trial. . . ."

The views of the State court below, in respect to the above construction of the Kentucky statute, *i.e.,* that the scienter requirement is "knowledge of the contents and character" are completely non-reviewable by this Court. Where the validity of a statute has been sustained in the face of federal objections, the Supreme Court *must* accept the State Court's construction and proceed to test the validity on that basis. *General Trust Company v. Blodgett,* 287 U.S. 509, 513; *Kingsley Pictures Corporation v. Regents,* 360 U.S. 684, 688, 3 L. Ed. 2d 1512, 79 S. Ct. 1362 (June 29, 1959).

B. Proof of Specific Intent and "Subjective" Knowledge Is Not Constitutionally Compelled by Smith v. California. Mishkin v. New York Instructs Us That "Objective" Knowledge of the Content and Character of the Materials, Being Synonymous With Reckless Conduct, Meets the Smith Requirements.

Petitioner argues in Point I of his brief that this Court's decision in *Smith v. California* imposes a constitutional requirement that the people must "plead . . . that the accused knew that the material involved was obscene and, with such guilty knowledge, published, distributed or sold the material *with the specific intent* to appeal to a prurient interest". (Pet. Br. pp. 12, 14, 20-24, 30; our emphasis.) Such an interpretation misreads *Smith v. California*, 361 U.S. 147, 80 S. Ct. 215, 4 L. Ed. 2d 205 (Dec. 14, 1959), and totally disregards the subsequent expressions of this Court in *Mishkin v. New York*, 383 U.S. 502, 16 L. Ed. 2d 56, 86 S. Ct. 958 (March 21, 1966). This Court has already established that "subjective" knowledge is not the prosecutor's burden of proof under the constitutional limitation.

It is important at the outset of these arguments that a frame of reference be drawn to insure cohesiveness. The proper frame of reference is the one under investigation — the defendant's state of mind.

1. An Analysis of the Defendant's State of Mind in Relation to the Mental Element of "Knowledge".

The prosecution's concern is the state of mind that must be proved as to any defendant, as expressed in the scienter provisions of the Penal Statute.

Consider the state of mind spectrum which may exist "subjectively" in any person who has sold a book which

is obscene as a matter of fact. Degrees of "subjective" knowledge are listed in chronological order.

(1) He may have been aware of the fact that the material was obscene from personal evaluation (knowledge of fact);

(2) He may have believed the fact the material was obscene, but his awareness was not from personal evaluation (knowledge of fact);

(3) He may have been aware that he had not the slightest notion whether the book was obscene or not (avoidance of knowledge);

(4) He may have believed the book not obscene, but have had no reasonable grounds for his belief (knowledge contrary to fact — criminal negligence);

(5) He may have believed the book not obscene, but have had reasonable grounds for his belief (knowledge contrary to fact — or only slight negligence).

Addressing himself to the above range in attitudes, Professor Rollin M. Perkins notes that the two extremes (1) and (5) require little comment. (Perkins, A Rationale of Mens Rea., 52 Harv. L. Rev. 905 (1939); Perkins on Criminal Law, p. 684.) Only in the most theoretical discussions would it be questioned that one has knowledge of facts of which he has been made aware by his own observations. Similarly it would not be suggested that one has knowledge of facts when he has a bona fide belief otherwise, based upon reasonable grounds, unless (1) the particular offense does not require *mens rea* for conviction, *i.e.*, traffic offense, or (2) the deeds even under the circumstances as they were

reasonably supposed to be, would have involved such a degree of social fault that the doer may properly be held to have acted at his peril in this regard. Statutory rape is such an offense. The state of mind in category (5) has generally been interpreted by the courts to be no defense. One who has unlawful intercourse with a girl under the age of consent is guilty of statutory rape although he *reasonably* believed she was over that age.

Class (2) is regarded as "knowledge" as that word is used in regard to *mens rea.* The distinction between class 2 and class 3 is the difference between an actual "belief" and a mere fugitive doubt based upon no grounds at all.

Class (3), "guilty avoidance of knowledge" may take either of two forms: One with a deliberate anti-social purpose in mind may make a positive statement purporting to be based upon his own knowledge, being fully aware that he has no such knowledge, in order to forestall an inquiry into the facts by another, or to mislead an inquiry in a proceeding such as the trial of a case; or one with a similar purpose may deliberately "shut his eyes" to avoid knowing what would otherwise be obvious to view. In such cases, so far as the criminal law is concerned, the person acts at his peril in this regard, and is treated as having "knowledge" of the facts as they are ultimately discovered to be.

Awareness of fault is the characteristic which distinguishes class (3) from class (4). In the latter—bona fide belief contrary to fact, not based upon reasonable grounds, there is no awareness of fault — the belief is entertained in good faith but was acquired as a result of gross negligence.

Classes (1), (2) and (3) are distinguishable from classes (4) and (5) in that in the latter, the subjective belief is actually contrary to the fact, one results from gross negligence and the other from slight negligence or no negligence.

Professor Perkins diagrams the meaning of "knowledge" as a *mens rea* requirement as follows:

"Knowledge"

(1) Guilty knowledge. Awareness of the fact as a result of personal observation.

(2) Guilty belief which is correct.

(3) Guilty avoidance of knowledge.

(a) Guilty statement as of knowledge by one who is aware that he does not know,—which statement turns out to be contrary to the fact.

(b) Guilty "shutting of the eyes" for fear of discovering the fact which an investigation would have disclosed.

Want of "knowledge"

(4) Bona-fide belief contrary to fact resulting from criminal negligence.

(5) Bona-fide belief contrary to fact but based upon reasonable grounds (or resulting from only slight negligence).

2. The Scope of the "Mental Element" Established in Smith v. Calif.

The "scienter" requirement came into the law through Justice Brennan's opinion in *Smith v. California* (*supra*).

Eleazar Smith operated a retail book and magazine store in Los Angeles. Among his stock was a book entitled *Sweeter Than Life* by Mark Tryon, published by an obscure publisher, Vixen Press. A Los Angeles police officer bought some magazines and a copy of the book from a clerk in Smith's store and then arrested the clerk.

At the time of Smith's arrest, two obscenity laws were operative in the Los Angeles jurisdiction: The California State Obscenity Statute, and a Los Angeles City Ordinance on Obscenity. Smith was charged only with a violation of the City Ordinance. The difference in the two statutes is explained by Judge Swain in his dissenting opinion in *People v. Smith,* 161 Cal. App. 2d 860, 237 P. 2d 636 (June 23, 1958), which affirmed Smith's conviction at page 641:

> "A defendant is not guilty of violating Penal Code Section 311 *unless he had knowledge of the character of the material. People v. Wepplo, supra,* 947, 78 Cal. App. 2d 959, 964, 178 P. 2d 853. *To the word 'knowledge' we would add 'or notice,' meaning thereby knowledge of facts which would have put a reasonable and prudent man on inquiry as to the contents of the materials.* To appear profound, we refer to this knowledge or notice as 'scienter.' Under the city ordinance the prosecution does not have to prove scienter; under the Penal Code section, it does . . ." (Our emphasis.)

The trial court found Smith guilty and sentenced him to 30 days in jail. The Appellate Department of the Superior Court affirmed the judgment.

On appeal to this Court, Justice Brennan in the majority opinion (joined by Warren, Clark, Stewart and

Whittaker) reversed the judgment, ruling that a state cannot constitutionally eliminate all mental elements from the crime; because to do so seriously restricted the dissemination of books that are not obscene.

The prosecutor's concern was voiced during arguments in the *Smith* case. If the *Smith* judgment were reversed, it would establish that a "mental element" was required, but it would also leave a void. What was the state of mind that had to be proved? How great or how slight was that burden of proof? How do the people, in fact, establish such proof? This Court in its opinion answered the people's fears that the prosecution of obscenity would be impossible if a "scienter" requirement were introduced, and in doing so established, what to *Amicus* seemed to be rather clear guidelines, at page 154:

> "It is argued that unless the scienter requirement is dispensed with, regulation of the distribution of obscene material will be ineffective, as booksellers will falsely disclaim *knowledge of their books' contents or falsely deny reason to suspect their obscenity*. We might observe that it has been some time now since the law viewed itself as impotent to explore the actual state of a man's mind, See Pound, The Role of the Will in Law,' 68 Harvard Law Review 1, cf. *American Communications Association v. Douds*, 339 U. S. 382, 411, 94 L. Ed. 925, 950, 70 S. Ct. 674. Eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element *in proving his awareness of its contents*. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial." (Our emphasis.)

The language "proving his awareness of its contents" seemed to negate any argument that "subjective" knowledge was a requirement.

The *Smith* Court at page 152, footnote 9, also pointed to the scienter requirement of the California Obscenity Statute considered in *California v. Alberts (Roth-Alberts)*, 354 U.S. 495, 1 L. Ed. 2d 1498, 77 S. Ct. 1314 (1957) and sustained in that case:

> "The General California Obscenity Statute, Penal Code Section 311 requires scienter, see note 3, and *was of course sustained by us in Roth v. U.S.*" (Our emphasis.)

An examination of the scienter burden imposed by the California statute and approved by the *Roth-Alberts* court should have silenced all argument on whether the constitutional requirement included a specific intent and proof of "subjective" knowledge, *i.e.*, classes 1, 2 and 3, *supra*. The judicial construction given by the California courts to the California statute which was before this Court in the *Smith* case appears in *California v. Smith*, 161 Cal. App. 2d 860, 237 P. 2d 636 (June 23, 1958):

> "A defendant is not guilty of violating Penal Code Section 311 *unless he had knowledge of the character of the material. People v. Wepplo, supra*, 947, 78 Cal. App. 2d 959, 964, 178 P. 2d 853. *To the word 'knowledge' we would add 'or notice,' meaning thereby knowledge of facts which would have put a reasonable and prudent man on inquiry as to the contents of the materials.* To appear profound, we refer to this knowledge or notice as 'scienter.'" (Our emphasis.)

Under the principle that this Court must accept a state court's construction of a statute and proceed to test its validity on that basis, *General Trust Co. v. Blodgett*, 287 U.S. 509, 513; *Kingsley Pictures Corp. v. Regents*, 360 U.S. 684, 688, it would appear that this Court saw no constitutional problems with the test imposed therein. The prosecutor's burden under *Calif. v. Alberts* was "knowledge of the character of the material or knowledge of facts which would have put a reasonable and prudent man on inquiry as to the contents of the materials." There is little doubt that "subjective" knowledge is *not* a requirement under this California test. "Objective" knowledge is sufficient — the measuring rod was the reasonable and prudent person, not the defendant. A reasonable classification of the prosecutor's burden in the *Alberts* case would certainly include class (4) *supra*.

The Smith Court also pointed out at footnote 9 certain differences between the common law scienter approach and that proposed by the drafters of the American Law Institute, Model Penal Code in their 1957 draft.

> "The common law prosecutions for the dissemination of obscene matters strictly adhered to the requirement of scienter . . . Cf. . . . American Law Institute, Model Penal Code, Section 207.10 (7), tentative draft No. 6, May 1957, and Comments, pages 49-51."

The Comments to the 1957 Model Penal Code, referred to by the Smith Court, point out at page 49 that under the common law precedents, "subjective" knowledge was not the prosecutor's burden in this area of the law.

"Under prevailing obscenity laws, the prosecution must prove that defendant knew or, *at least was reckless* as to the presence of objectionable material in a book or other publication disseminated by him. *It does not have to prove that defendant was aware of the evil tendency of the material. . . .*" (Our emphasis.)

Nor was "honest mistake" a defense, at page 49:

"Our recommendation may seem hard on the defendant unless one bears in mind that prevailing law is even rougher, *absolutely precluding any defense based upon the defendant's misappraisal of the tendencies of the material. . . .*" (Our emphasis.)

On the other hand, the American Law Institute, Model Penal Code (1957 draft) was designed to change the prevailing law on "scienter" in the obscenity area, by establishing "honest mistake" as a defense. The following comment appears at page 51:

"Nevertheless we believe that a possibility of acquittal for honest ignorance should be preserved. In the great bulk of cases brought to prosecution the unequivocally obscene character of the material will guarantee conviction against any contention of subjective innocence of the actor. On the other hand, in those cases admitting of a respectable argument that the appeal of the material is predominantly artistic or scientific, retention of this mens rea defense will help to preserve a proper conservatism in law enforcement effort in this field."

To accomplish this objective certain presumptions of "scienter" were established, arising out of proof of possession, etc., which in turn the defendant was permitted to rebut by proving honest mistake, etc. Two alternates were proposed.

One proposal suggested shifting the burden of proof from the People to the defendant. This is accomplished by creating a rebuttable presumption of "scienter" in the defendant's act of dissemination, etc., and placing the burden on the defendant to overcome the presumption by a "preponderance of evidence" to the contrary. An alternative scheme in the 1957 draft suggested the same rebuttable presumption but left with the People the burden of proving "scienter" beyond a reasonable doubt. The 1957 draft also established "knowingly and recklessly" as the prosecutor's burden of proof. Section 2.02(2)(c) defines "recklessly" as:

> (c) *Recklessly.* A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation. . . ."

Ignorance or mistake as to a matter of fact or law was made a defense by Section 2.04 of the Model Penal Code if the ignorance or mistake negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense.

A reasonable classification of the prosecutor's burden under the proposals contained in the 1957 draft of the Model Penal Code would certainly include class (4) *supra*, the definition of "recklessly" being the equivalent of criminal negligence.

The Smith Court refused to comment on the American Law Institute's Model Penal Code proposals. In its opinion at page 212 the Court specifically left three areas undecided:

(1) Whether honest mistake need be an excuse, (2) whether a *prima facie* presumption might shift the burden of going forward with the evidence, and (3) whether a *prima facie* presumption might shift the burden of proof,

> "We need not and most definitely do not pass today on what sort of mental element is requisite for a constitutionality permissible prosecution of a bookseller for carrying an obscene book in stock; whether honest mistake as to whether the contents in fact constitutes obscenity *need be an excuse;* whether there might be circumstances under which the State constitutionally might require that a bookseller investigate farther, or might put on him the burden of explaining why he did not, and what such explanation might be. . . ." (Our emphasis.)

The specific designation of three areas of reservations would seem to indicate that all other matters were meant to be resolved by that opinion.

It thus appears that, after Smith, specific intent and "subjective" knowledge was definitely not a limiting requirement. The Court's approval of the language "in proving his awareness of its contents", its apparent ap-

proval of the scienter provision as construed by the California courts in *California v. Alberts, supra,* which employed the "reasonable and prudent man" test, and the Court's reference to the common law precedents and the 1957 draft of the American Law Institute Model Penal Code, which accepted "recklessness" as an acceptable position of reference, were strong support for the proposition that the prosecutor did not have the burden of proving "subjective" knowledge on the part of the defendant as a constitutional limitation. This proposition was recently confirmed by this Court's decision in *Mishkin v. New York, supra,* approving the burden of proof established in the New York statute, as interpreted by the New York Court of Appeals.

3. Mishkin v. N.Y. Holds Awareness of Content and Character of Material, Being Synonymous With Reckless, Meets Smith Requirements.

Mishkin's argument before this Court had two prongs: (1) that the People's burden of proof under the New York statute was to prove beyond a reasonable doubt that the defendant knew (subjectively) that the subject matter was obscene, and (2) that the people's evidence had not met this burden. In his brief, he argued at pages 14 and 15:

> "There is not a scintilla of proof that the appellant knew the books to be obscene or sadistic or masochistic. He might have known they were erotic, but that knowledge is not sufficient."
>
> "It is not a satisfactory answer to this problem that if proof of knowledge of the obscene character is to be required, then it would not be possible to prosecute for this crime . . ."

> ". . . nor is it necessary for the appellant to offer suggestions as to how such proof is to be presented. The burden is on the prosecutor to justify the suppression of publications, and it is for it to discover the method for sustaining the burden . . ."

This was also the same argument that had been made and rejected in another retailer case *New York v. Finkelstein,* 11 N. Y. 2d 300, 229 N.Y.S. 2d 367, 183 N.E. 2d 661, cert. den. 371 U.S. 863, 83 S. Ct. 116, 9 L. Ed. 2d 100 (Oct. 15, 1962), which had twice been before the New York Court of Appeals. In those decisions the New York Court of Appeals had "authoritatively interpreted" the scienter requirement of the state obscenity statute, in a manner which was contrary to Mishkin's urging.

In replying to Mishkin's contention regarding the construction to be given to the New York Court of Appeals' language in the two *Finkelstein* cases this Court was required to construe the manner in which the different language in both cases was employed: one spoke of "aware of the character of the material", the other of "knowledge of the contents."

Pointing to the New York court's remarks in the second *Finkelstein* case which equated "scienter" with "knowledge of the contents" Justice Brennan indicated that the High Court interpreted that language as consistent with, rather than a modification of the New York court's previous scienter interpretation that "only those who are in some manner *aware of the character of the material* they attempt to distribute should be punished" and that "calculated purveyance of filth is exorcised." voiced in the first *Finkelstein* case. The

New York Statute required less than actual subjective knowledge, but more than "innocent" purveyance. In this regard, Justice Brennan cited the scienter requirement of Model Penal Code Section 251.4 (2), 1962 and the Commentary, Model Penal Code (Tentative Draft No. 6 1957) 14 at pages 49 to 51, both of which were described as expressing a "similar" requirement. Section 215.4 (2) of the Model Penal Code (1962) cited by Justice Brennan provides that: ". . . a defendant commits a misdemeanor if he knowingly or recklessly . . . sells, etc. . . . obscene matter," and establishes a rebuttable presumption from the fact of possession for sale of obscene matter:

> "A person who disseminates or possesses obscene material in the course of his business is presumed to do so knowingly or recklessly. . . ."

Model Penal Code, Section 251.4(2) having been cited as having a scienter requirement "similar" to the New York standard which it approved, it therefore follows that the Court in *Mishkin* also approved the "knowingly or recklessly" requirement of the Model Penal Code as fulfilling the constitutional requirements. Whereas it appeared from other language in *Smith* that this would follow, *supra*, the *Mishkin* decision erased all doubt in this regard.

A person would be guilty under the "recklessly" standard of the Model Penal Code not only where he purposely avoided making a judgment on the material (class 3, *supra*), which Professor Perkins indicates is customarily regarded as "knowledge", but also where he personally was of the belief that the material was not obscene, but had no reasonable grounds for the belief—"objective" knowledge (class 4, *supra*). It therefore

clearly is the law that there is no constitutional requirement which establishes "subjective" knowledge as the people's burden of proof.

C. The Kentucky Standard, "Knowledge of the Contents and Character" of the Magazines Satisfies the Constitutional Requirement, Established in the Smith Case and Clarified by Mishkin, Being the Equivalent of the Test Employed by the New York Courts in the Latter Case.

This Court, in upholding the scienter provision of New York Penal Law, Section 1141 in the *Mishkin* case, relied upon the interpretation given that section by the New York Court of Appeals in *People v. Finkelstein*, 9 N.Y. 2d 342, 344, 348, 174 N.E. 2d 470, 472 (1961). There the Court of Appeals "interpreted" the statute to require the "vital element of scienter" which it interpreted as "awareness of the contents," at page 471:

> "In *Smith v. People of State of California* . . . the United States Supreme Court declared unconstitutional a Los Angeles City ordinance which proscribed, and was construed to impose strict liability for mere possession of obscene prints, regardless of the offender's *awareness of the contents.* The New York proscription, on the other hand, neither expressly, nor by our construction here, dispenses with this *vital element of scienter,* and therefore, in no way impinges upon the traditional freedom guarantees of speech and press (*Roth v. U. S.*) . . ." (Our emphasis.)

Speaking further on the people's burden of proof which the Court had read into the statute in its decision, the Court there said at page 471:

> "A reading of the statute as a whole clearly indicates that only those who are *in some manner aware of the character of the material* they attempt to distribute should be punished. *It is not innocent but calculated purveyance of filth* which is exorcised . . ." (Our emphasis.)

Reading the entire language of that Court together, it is apparent that the New York test is "awareness of the contents plus awareness of the character of the material." Taken together the language spells out "not innocence but calculated purveyance of filth", for awareness of "character" implies an awareness of the distinguishing characteristic of the material, "Character" being defined in Webster's Collegiate Dictionary, Fifth Edition, as:

> 1. A sign or token placed upon an object as an indication of some special fact, as ownership or origin, a mark, brand or stamp. 2. Hence (a) A graphic symbol of any sort; . . . 3. An attribute, quality, or property; esp., a distinguishing attribute.

Circuit Judge C. Warren Eaton of the McCracken Circuit Court in his instructions on scienter, gave essentially the same test to the jury below. It follows that the standards employed to guide the Kentucky jury in its deliberations were correct.

II.

THE PRIMA FACIE PRESUMPTION OF SECTION 436.100(4) OF THE KENTUCKY REVISED STATUTES AS CONSTRUED AND APPLIED BY THE COURTS OF THE COMMONWEALTH OF KENTUCKY DID NOT DEPRIVE PETITIONER OF ANY OF HIS CONSTITUTIONAL RIGHTS.

A. The Prima Facie Presumption Is Rationable and Reasonable.

In 1896 the United States Supreme Court said in *Rosen v. U.S.*, 161 U.S. 29, 42:

> "Everyone who uses the mails of the United States for carrying papers or publications must take notice of what, in this enlightened age, is meant by decency, purity, and chastity in social life and what must be deemed obscene, lewd and lascivious . . .".

This modern court in 1957 in its landmark decision in *Roth v. U.S.*, 354 U.S. 476, 491 considered the above language of the *Rosen* case to be sufficiently "alive" to answer the petitioners' arguments in that case, that the obscenity statutes do not provide "reasonably ascertainable standards of guilt", citing the same in footnote 28 as an answer to that proposition. Considering the context in which the citation was used, it would appear as though the *Roth* Court was saying that a person who has knowledge of the contents is *presumed to know* and is *chargeable with knowledge of* what the community standards are, and what a jury will declare obscene.

Independent of how severely a state legislature might choose to define the people's burden of proof on scienter in any state obscenity statute, and independent of whether "honest mistake" need be an excuse, proof by the

People (1) that a defendant had knowledge of the contents of the materials and (2) that the material was obscene, should, at the very least, under the *Rosen* rule, establish a *prima facie* case against the defendant, functioning like a *prima facie* presumption.

Section 251.4(2) of the 1962 Model Penal Code provides in part:

> "(2) Offenses. Subject to the affirmative defense provided in Subsection (3), a person commits a misdemeanor if he knowingly or recklessly: (a) sells, etc., any obscene writing, etc. . . . *A person who disseminates or possesses obscene material in the course of his business is presumed to do so knowingly or recklessly . . .*". (Our emphasis.)

The *prima facie* presumption voiced in the 1962 draft arises from proof of possession or dissemination of obscene material in the course of business whereas, under our analysis of *Rosen*, the presumption there would arise from proof of "knowledge of the contents of obscene materials". It thus appears that the 1962 draft of the Model Penal Code follows the basic principle expressed in the *Rosen* case, except that an additional inference is employed *i.e.*, that a person knows the contents of what he possesses for sale. Also, the possibility of acquittal for honest mistake is permitted, as a matter of defense in the Model Penal Code version.

Although it is fundamental to the criminal law that a defendant is presumed to be innocent until the contrary is proved, that the burden of proving the contrary rests with the People all during the trial, and that in case of a reasonable doubt the defendant is entitled to acquittal,

such principles are subject to a number of practical exceptions.

One of the exceptions is that the burden of going forward with the evidence may be shifted to the defendant by a presumption which meets the test of constitutional due process: *i.e.*, where there is a rational connection between the facts proved (as in *Rosen*, that the subject matter is obscene and that the defendant had knowledge of the contents of the subject matter) and the additional facts presumed (that the defendant was aware the subject matter was obscene). See *California Evidence*, Witkin, at page 74.

The additional inference, beyond the *Rosen* reasoning, required in the 1962 Model Penal Code *i.e.*, that a person knows the contents of what he possesses for sale, does not appear unreasonable. See *Nebraska v. Jungclaus*, 176 Neb. 641, 126 N.W. 2d 858 where the Nebraska Supreme Court said at page 863 in a criminal case involving the possession of nudist magazines for sale:

> "*A seller of magazines and phonograph records is ordinarily presumed to know what he is offering for sale,* although it is not universally so. The operator of a book store, for instance, would not be presumed to know of every iolated obscene statement in the hundreds of books that he has for sale. But in a situation, as here, where the covers of the magazines, front and back, are occupied with pictures of nude women in various poses, it can hardly be said that the jury could not infer knowledge of their contents by the defendant and an intent to sell obscene materials . . .". (Our emphasis.)

For other courts which have seen the wisdom in either an inference or a rebuttable presumption in such cases, see *Minnesota v. Oman,* 261 Minn. 10, 22, 110 N.W. 2d 514, 523 (Sept. 1, 1961); *Connecticut v. Andrews,* 150 Conn. 103, 186 A. 2d 546, 552 (Nov. 6, 1962); *New Jersey v. Hudson County News Co.,* 41 N.J. 247, 196 A. 2d 225, 231 (Dec. 13, 1963); *State v. Miller,* 145 W. Va. 59, 112 S.E. 2d 472, 478.

The facts of the *Finkelstein* case lead one to believe that the Court of Appeals was thinking somewhat along the lines of the drafters of the Model Penal Code when it sent the case back for retrial so that the defendant could come forward with testimony or proof to explain the "presence of salacious literature in their possession." At page 472:

> "Although the people have the burden of proof defendants may have an opportunity to testify or offer proof, if they desire, in regard to the presence of salacious literature in their possession for sale. . . ."

The *prima facie* presumption under Section 436.100(4) of the Kentucky Revised Statutes arises upon proof by the people (1) that a *person sold the material* and (2) that the material was obscene. The same rational connection exists here, between the facts proved and the additional fact presumed, as in the 1962 Model Penal Code version, *Jungclaus* and the other cases which have recognized this relationship independent of statute.

B. Petitioner Has No Standing to Attack the Application and Provisions of Section 436.100(4) Which Are Not Involved in This Appeal.

The long-established rule that one may not invoke the constitutional rights of another has traditionally been held to imply, in the case of a statute whose application to A would be within the legislative competence but whose application to B would not, that if A is convicted for violating the statute, he may not challenge his conviction on the grounds that B, who is also included within the statutory terms, would be immune from conviction.

The people in presenting what they regarded as a *prima facie* case did not resort to the statutory presumption. They made no reference to it during their arguments to the jury [R. 85-92] and an examination of the people's evidence presented during their case in chief (Statement of Facts, *supra*), reveals a case supported by sufficient evidence and needing no presumption to go to the jury.

The trial judge in his instructions to the jury, prior to their deliberation, made no reference to the provision.

In fact, at no place in the transcript is there any reference to its provisions. It is in the above context that this Court is being asked to rule upon the constitutionality of this legislation.

This Court will not, and should not, inquire into the constitutionality of a statute in the abstract. *United States v. Raines*, 362 U.S. 17, 21 (1960).[1] Even were

[1]"This Court, as in the case with all federal courts, 'has no jurisdiction to pronounce any statute, either of a state or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudicate the legal rights of liti-

this Court to consider and hold Section 436.100(4) unconstitutional, it would still not affect the conviction in this case, which was effected solely under Section 436.100(2).

III.

THE COURT'S REFUSAL TO INSTRUCT THE JURY THAT THEY MUST ACQUIT THE PETITIONER IF THEY FOUND HE HAD A "GOOD FAITH BELIEF" WAS NOT AN ABRIDGMENT OF HIS CONSTITUTIONAL RIGHTS.

A. The Excuse of "Good Faith Belief" Is Not, and Should Not Be Made, a Constitutional Requirement of the Obscenity Crime.

In his brief, Petitioner cites numerous instances wherein this Court has, as a matter of constitutional doctrine, engrafted onto state and federal criminal statutes and civil actions which affect conduct in the free speech area, a stricter "mens rea" requirement than that which was chosen by the legislative bodies and approved by lower state and federal courts. In none of these cases however, did the countervailing governmental or private force in play, approach the importance of the public interest, in ascertaining that the obscenity

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gants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' Liverpool, New York and Philadelphia S.S. Co. v. Commissioners of Immigration, 113 U. S. 33, 39. *Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional. U. S. v. Wurzbach, 280 U. S. 396." United States v. Raines,* 362 U. S. 17, 21 (1960). (Our emphasis.)

laws are rigidly enforced. The right of a public official to collect damages for a defamatory falsehood, or the right of government to punish individuals for defamatory statements regarding public officials is not so weighty when balanced against the type of speech being impaired (political) by the proposed controls. On the other hand, the right of the government to maintain proper standards of sexual morality in the community carries overriding importance when balanced against the type of speech being impaired (sexual). *Cf.*, Justice Harlan, dissenting in *A Quantity of Books v. Kansas*, 378 U.S. 205, 12 L. Ed. 2d 809, 821, 84 S. Ct. 1723.

Petitioner contends that the "mens rea" requirement must reflect a "subjective" standard so that he might have the opportunity to show "good faith belief" in defense, else he will suffer impairment of personal rights of freedom of speech and press. The people contend otherwise, in the belief that "objective" standards are required by the police power of the state, if the social evil of obscenity is to be controlled.

The controversy thus framed, places in the balance two opposing forces which are set into motion by our constitutional form of government. On the one hand, we have the defendant claiming supremacy of an individual's right of free speech and press, as guaranteed by the First and Fourteenth Amendments of the Federal Constitution. On the other hand, we have the people laying claim to supremacy of the right of government to regulate matters relating to public morals, by proscribing obscenity, as reserved to state governments by the Ninth and Tenth Amendments to the Federal Constitution.

In 1957 this same controversy faced the United States Supreme Court in *Roth-Alberts*. There this Court drew the balance between the two conflicting powers, which it expressed in terms of the *Roth* test. The same type of controversy is again before the Court, this time in relation to the "mens rea" requirement.

Because the determination involves fundamentally a balancing of the two powers, amicus wishes to underscore the relative importance of the interest which supports the right of government to apply an "objective" standard.

1. The Paramount Right of Government to Regulate Matters Relating to Sexual Morality.

In 1874 Justice Swayne, speaking for an unanimous United States Supreme Court in *Trist v. Child*, 21 Wall. 441, 450 (1874), said:

> "The foundation of a republic is the virtue of its citizens. They are at once sovereigns and subjects. As the foundation is undermined, the structure is weakened. When it is destroyed, the fabric must fall. Such is the voice of history. . . ."

Concerning the power of government to regulate matters relating to *public morals* and power to say what is offensive to *public morality*, the United States Supreme Court said, in *Mugler v. Kansas*, 123 U.S. 623 (1887):

> "The power to determine such questions (what is offensive to public morality) so as to bind all, must exist somewhere; else society will be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security of many, provided only they are

permitted to do as they please. Under our system, *that power is lodged in the legislative branch of the government.* It belongs to that department to exert what are known as police powers of the state, *and to determine what measures are appropriate or needful for the protection of the public morals,* the public health, or the public safety. . . ." (Our emphasis.)

The public morality that we are concerned with here are standards which relate to the sex function. Such standards encompass not only the sexual parts as they are exhibited in public displays, but also as they may be permitted by the community to become proper subjects for public discussion.

That such standards do, in fact, exist and are enforced, can be seen from the fact that government uniformly and without serious opposition enforces laws which require persons to conceal the sex organ and private parts of the body while in public. It can hardly be argued that a person might appear naked in the court room under the guise that he or she were "speaking out" on behalf of nudism, nor could that person parade naked elsewhere in the community. His or her subjective intent may be wholesome, but the community can properly equate such conduct with lewdness, because of the prevailing sentiment in the community concerning standards of decent exposure of the person. Even Justice Douglas, was willing to concede in *Roth (supra)* at page 512, that:

> "No one would suggest that the First Amendment permits nudity in public places, adultery, and other phases of sexual misconduct."

Similarly, representations and discussions of sex and its function may be regulated insofar as they do offend public policy as expressed through the obscenity laws.

It is to maintain the sexual standards, which are acknowledged by the great majority of people in our society, that government has, under the police power, enacted laws on indecent exposure and obscenity. Such right is an inherent part of our self-government, having been passed down to us, in our Constitution, from the Common Law Courts of England, which recorded their existence over three centuries ago.

LeRoy v. Sedley, 1 Sid. 168, 82 Eng. Reprint 1036 (1663);

4 Bl. Comm. 64;

Rex v. Curl (1727) 2 Strange 788;

Commonwealth v. Sharpless, 2 S and R. 91, 7 Am. Dec. 632 (1815);

Roth-Alberts, supra.

Louis B. Schwartz, co-reporter of the Model Penal Code, explains the governmental function of the obscenity crime in society as follows in "Morals Offenses and the Model Penal Code" appearing in 63 Columbia Law Review 669, 671 (cited by this Court with approval in *Ginzburg v. U.S.,* 16 L. Ed. 2d 31, at page 38, fn 12; page 39, fn 14; page 41, fn 19; and *Mishkin v. N.Y.,* 16 L. Ed. 2d 56 at page 63, fn 9) at page 671:

". . . the great majority of people believe that the morals of 'bad' people do, at least in the long

run, threaten the security of the 'good' people. . . . It is hard to deny people the right to legislate on the basis of their beliefs not demonstratably erroneous, especially if these beliefs are strongly held by a very large majority. The majority cannot be expected to abandon a credo, and its associated sensitivities, however irrational, in deference to a minority's skepticism.",

and at page 672:

"If unanimity of strongly held moral views is approached in a community, the rebel puts himself, as it were, outside the society when he arranges himself against those views . . . the community cannot be expected to make (his) first protests respectable or even tolerated by the law. . . ."

Mr. Schwartz continues at page 681:

"But equally, it is not merely sin-control of the sort that evoked Professor Henkin's constitutional doubts. Instead, the community is merely saying: 'Sin, if you must, in private. Do not flaunt your immoralities where they will grieve and shock others. If we do not impose our morals upon you, neither must you impose yours upon us, undermining the restraints we seek to cultivate through family, church, and school.' *The interest being protected is* not, directly or indirectly, the souls of those who might be depraved or corrupted by the obscenity, but *the right of parents to shape the moral notions of their children, and the right of the general public not to be subjected to violent psychological affront.*" (Our emphasis.)

In sum, the case for the governmental action taken by the state was stated by Justice Harlan in his concurring opinion in *Roth-Alberts (supra)*, at page 502:

> "The State can reasonably draw the inference that over a long period of time the indiscriminate dissemination of materials, the essential character of which is to degrade sex, will have an eroding effect on moral standards. . . ."

Amicus believes that the history of our government refutes petitioner's claim to a supremacy of the personal right of an individual to have a "subjective" standard as a measuring gauge for the "mens rea" in the obscenity crime.

2. The Public Policy of This Court Has Always Championed the Obscenity Laws.

The public policy of this Court has always championed the obscenity laws and the suppression of obscenity. See *Rosen v. U.S.*, 161 U.S. 606 (1896), decided by the U.S. Supreme Court at the turn of the century. Rosen attempted to escape a jury conviction on an obscenity charge on a technicality. He sought his freedom on appeal, arguing that, because the People had not described the obscenity in their complaint, he had not been properly informed of the nature of the crime. United States Supreme Court Justice John Marshall Harlan, grandfather of the present United States Supreme Court Justice John Marshall Harlan, rejected this plea out of hand and, in invoking the unanimous rule of the courts at that time, drew from the language of

an earlier Massachusetts Supreme Court decision at page 608:

> "It can never be required that an obscene book and picture should be displayed upon the records of the court. . . . This would be to require that the People itself should give permanency and notoriety to indecency in order to punish it."

This favored policy is not difficult of understanding. Central to our heritage is the expectation that our Courts should strive to preserve our heritage and should not give scandal by tolerating anything which tends to debase public morals.

Less than 35 years ago this Court underscored this same "favored position" of the obscenity laws when, in *Near v. Minnesota,* 283 U.S. 697, 51 S. Ct. 625, 75 L. Ed. 1357 (1931) the members of that Court made it clear that immunity from previous restraint did not extend to obscene publications.

Eleven years later, not one member of the 1942 Court entertained any doubt that the existence of obscenity was contrary to the people's abiding interest in good public morals. Neither the prevention of publication (previous restraint) nor criminal punishment for dissemination raised any constitutional problems in their view. In *Chaplinski v. New Hampshire,* 315 U.S. 568, 86 L. Ed. 1031, 62 S. Ct. 766 (1942) that Court said at page 571:

> ". . . There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene. . . . It has been well observed that such utterances are no essential part of any exposi-

> tion of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . ."

Ten years later, the majority of the members of the 1952 Court in *Beauharnais v. Illinois,* 343 U.S. 250, 72 S. Ct. 725, 96 L. Ed. 919 (1952) agreed with the *Chaplinski Court,* adding:

> "Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances (clear and present danger) . . ."

When, five years later, in *Roth v. U.S.* and *Alberts v. California,* 354 U.S. 476, 77 S. Ct. 1314, 1 L. Ed. 2d 1498 (June 24, 1957), this present Court was faced with a broadside attack on the statutes guarding public decency, seven members of this modern court stood firm and enunciated a solid distaste for obscenity. *Rosen v. U.S. (supra), Near v. Minnesota (supra), Chaplinski v. New Hampshire (supra),* and *Beauharnais v. Illinois (supra)* were all confirmed. The language of *Rosen* was cited with approval. Everyone was charged with notice of what must be deemed obscene. The *Roth-Alberts* majority opinion placed emphasis on the language of *Chaplinski* noted above. Obscene utterances were of such slight social value as a step to truth that any benefit to be derived from them was clearly outweighed by the social interest in order and morality. The above language of the *Beauharnais* Court was cited with approval. No one could contend that obscene speech could be punished only upon a showing of a clear and present danger.

More recently, the expression of this Court in *Ginzburg v. U.S., supra,* condemning the "sordid business of pandering," confirmed the more ancient precedents and helped to correct a contrary impression felt by many, arising out of this Court's policy treatment in "prior restraint" cases.

3. Rosen v. U.S., Is Strong Precedent Against Such a Proppsition.

In 1896, the same attack as petitioner makes here was made against the "scienter" provision of the federal postal statute in *Rosen v. U.S.,* 161 U.S. 29. There the Court, based upon its historic opposition to obscenity, held "subjective" knowledge of obscenity irrelevant and "good faith belief" no defense.

In *Rosen* the defendant was convicted under a federal statute which made it a misdemeanor to knowingly deposit obscene matter in the mail. The trial court *had refused to give a jury instruction which provided that the jury must acquit if it entertained a reasonable doubt whether the defendant knew that the matter was obscene.* On appeal, the U.S. Supreme Court said at page 610:

> "The statute is not to be so interpreted. The inquiry under the statute is whether the paper charged to have been obscene, lewd, and lascivious was in fact of that character, and if it was of that character and was deposited in the mail by one who knew or had notice, at the time, of its contents, the offense is complete, although the defendant himself did not regard the paper as one that the statute forbade to be carried in the mails. *Congress did not intend that the questions as to the character of the paper should depend upon the opinion or be-*

lief of the person who, with knowledge or notice of its contents, assumed the responsibility of putting it in the mails of the United States. The evils that Congress sought to remedy would continue and increase in volume if the belief of the accused as to what was obscene, lewd, and lascivious was recognized as the test for determining whether the statute had been violated. Everyone who uses the mails of the United States for carrying papers or publications must take notice of what, in this enlightened age, is meant by decency, purity, and chastity in social life and what must be deemed obscene, lewd and lascivious." (Our emphasis.)

This modern Court considered the *Rosen* case controlling precedent in *Roth-Alberts, supra,* footnote 28 as to the attack denying "reasonably ascertainable standards of guilt" in the obscenity statute. The Sixth Circuit Court of Appeals thought it controlling in *United States v. West Coast News Co. et. al.,* 357 F. 2d 855, 862 (Mar. 22, 1966).

Somewhat the same arguments, as petitioner makes here, regarding the burden placed upon the retailer etc. by *Rosen,* were made by the appellant in *Tyomies Publishing Co. v. United States,* 211 Fed. 385 (Mar. 3, 1914). In answer to the argument that this puts too great a burden of prescience on defendants, the Tyomies Court cited the language of Justice Holmes in *Nash v. United States,* 229 U.S. 373, 377:

"The law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine, or a short imprisonment, as here, he

may incur the penalty of death. An act causing death may be murder, manslaughter, or misadventure, according to the degree of danger attending it by common experience in the circumstances known to the actor. The very meaning of the fiction of implied malice in such cases at common law was, that a man might have to answer with his life for consequences which he neither intended nor foresaw . . ."

4. The Implications of Rosen Being Overruled Are Frightening.

In the years following the *Roth* decision and continuing on up to the cases decided during the October, 1965 Term, considerable confusion arose in the obscenity area because of a misunderstanding regarding the meaning of what this Court was doing in its decisions in previous restraint cases. The rumor was widespread that this Court was tolerating obscenity, when in reality it was developing harsh procedural rules where previous restraint controls were used. The prosecutor's bleat was that he had no remedy, and that it was useless to prosecute. No one noticed the criminal convictions which this Court left undisturbed on appeal. Out of this confusion arose the hard-core pornography interpretation of *Roth-Alberts,* dismissals without trial of several major cases against the prime movers in the pandering trade and serious impairment of obscenity controls.

The *Ginzburg* and *Mishkin* decisions handed down during the October Term, 1965 have provided the signal which was needed to release the prosecutive forces in a renewed effort to slow down the momentum which has been building up in the obscenity trade since 1957. Were

this Court now to require "subjective" knowledge and the excuse of a "good faith belief", as a constitutional requirement in the obscenity crime, the result would be to translate the innocent confusion which may have existed in some areas in the past into a weapon of destruction to be used against the people's cause.

This proposition can best be stated with an actual case example. Following the adoption of the hard-core pornography rule by the California Supreme Court in *Zeitlin v. Arnebergh,* 59 Cal. 2d 930, 383 P. 2d 152, 31 Cal. Rptr. 800 (July, 1963), law enforcement came to a virtual standstill in California. At the same time, an operator of a Main Street Arcade in Los Angeles was appealing a jury conviction obtained under the former *Roth-Alberts* test, for exhibiting girlie film "A" at the arcade. At the hearing on appeal, the court asked the Deputy City Attorney for arguments as to whether it was hard-core pornography and, receiving none, reversed the conviction, although other cases involving similar materials had consistently been upheld on appeal in that court. Whereupon, an employee of the Main Street operator moved into a more respectable neighborhood in County territory and opened a similar girlie film arcade, where he was arrested for exhibiting girlie film "B" which was substantially similar to girlie film "A". Thereafter, in successive proceedings: (1) on a petition for a writ of habeas corpus to the Superior Court; (2) a petition for a hearing in the Supreme Court; (3) on a motion to strike the complaint; before trial (4) on a motion to strike the complaint at the trial, and (5) in attempting to get girlie film "A" into evidence, the defense attorney subpoenaed girlie film "A" and even went so far as to subpoenae one of the

three appellate judges who had ruled on girlie film "A", to lay the foundation for a "good faith belief" defense. Looking at it objectively, what better "good faith belief", than reliance on the decision of an appellate court. To permit such to occur would translate mistake into immunity, all to the detriment of the community.

A similar situation has been created through a lack of understanding as to the meaning of this Court's rulings on injunction actions involving books which lay claim to literary merit, like Henry Miller's works and "Fanny Hill". The argument is "If this isn't obscene, what is?" with the result that successful prosecution of peddlers of hard-core pornography is being undermined by a claim of a right to a "good faith belief" defense, based upon their understanding (misunderstanding) of the *Fanny Hill* result.

Nor is this the only disastrous result. Such an action would overrule the holding in *Schindler v. U.S.*, 208 F. 2d 289, 290 (Nov. 30, 1953), cert. den., 347 U.S. 938. In that case, appellant placed an attorney on the stand and inquired of him whether he had advised appellant that in his opinion the various books involved in the mailing were "proper and legal". After objection, appellant offered to prove that he had in good faith consulted the attorney during the preparation for advice and had acted on his advice. The court rejected the offer, citing the *Rosen* case and the public policy involved, and this Court denied certiorari.

It is submitted that the foregoing situation did not exist in 1957 or in 1962 when the Model Penal Code provisions were considered. If the "subjective" knowledge and "good faith belief" defense were adopted as a constitutional requirement, the effect would be to open

Pandora's Box at a time in history already fraught with its own immediate problems which plague obscenity controls.

B. The Instruction Requested by Petitioner Was Improper Under "Good Faith Belief" Defense for the Mental Element Prescribed by the Kentucky Statute. It Failed to Instruct the Jury That Reasonable Grounds for the Belief Were Also Required.

Assuming petitioner was entitled to an instruction, still the instruction requested was erroneous.

A person's mistake as to a matter of either fact or law, where it is recognized, is a defense only if it negatives the existence of the mental state which the statute prescribes.

Thus, if the offense charged is one requiring a *specific* content in the true sense of intent, guilt may be disproved by an honest belief inconsistent with such an intent, even if the belief results from a mistake of law not based upon reasonable grounds. In other words in such a situation, a belief may be very sincere although not very reasonable and may even be reckless.

If however, for the guilt of the offense charged, there is required some lesser subjective mental element other than a specific intent in the true sense of the word, the question whether a mistake not based upon reasonable grounds could disprove guilt depends upon the scope of the special element for guilt. Where, as in the case of Kentucky Statute, the mental element is, or approaches reckless conduct, at the outside (knowledge of the content and character) a good faith belief based on reckless grounds would not be a defense since it is *not* inconsistent with the mental element required.

The instruction which petitioner requested, therefore was faulty in failing to instruct the jury that reasonable grounds were required for the belief. Perkins on Criminal Law, the Foundation Press, Inc. (1957), pages 806, *et seq.;* Model Penal Code (Draft 4), Section 2.04(1) and comments on pages 135 to 137. Amicus Curiae Council for Periodical Distributors Assn., Inc. appears to agree on this point. (Amicus Br. pp. 3, 6.)

C. The Evidence Which Was Excluded Was Inadmissible on the Grounds Offered.

As to the importance of a second-class permit, petitioner stated

> "we use the second-class permit quite a bit. We feel like a magazine that don't have a second-class permit maybe should be withheld from general distribution, *but frankly, I can't see any difference in the ones that have and don't have.*" [R. 30; our emphasis.]

By his own admission, the index he purported to use was of no value. Further testimony on such matter was irrelevant and immaterial. Such testimony did not tend to prove reasonable grounds for a good faith belief. Further, he indicated that the lack of a second-class permit did not mean that the magazine had been turned down by the Post Office Department, but that it may also mean that it had not been submitted. [R. 33.]

Plaintiff's answer "It is Impossible", in response to the question whether it would be possible for his concern to economically run an outfit like Readmore Newsstand and personally censor each of the 12,000 titles [R. 31], was objectionable as calling for a conclusion. Beyond this the question was leading and suggestive and argumentative.

The letter dated February 8, 1959 to Ray Kirk was irrelevant and immaterial, being too remote in time. Insofar as the letter pertained to the second-class permit matter, it was subject to the same objections noted above.

None of the evidence offered above tended to prove reasonable grounds for a good faith belief.

IV.

STANDARDS AND CRITERIA FOR REVIEWING THE STATE COURT JUDGMENT.

Petitioner was tried and convicted twice in a state court, both instances after jury trial and under rules of criminal procedure which accord the maximum safeguards to the rights of an individual *i.e.,* proof beyond a reasonable doubt and unanimous verdict. The state statute under which he was tried was enacted by the legislature in aid of public morality in relation to the sex function. The *mens rea* requirement was interpreted by the state judiciary to require proof of "knowledge of the contents and character" of the magazines, which under our analysis requires proof of an awareness an awareness of the nature of the materials from an "objective" viewpoint.

On this Writ, Petitioner seeks reversal of a State Court judgment claiming infringement of constitutional rights based upon the nature of the materials involved; and a special provision of the State Statute which was neither a part of the charge nor involved in the trial. The entire statute (KRS 436.100) has been repealed during the 1966 regular session of the legislature, being replaced by a new obscenity statute, KRS 436.101. The special presumption is not a part of KRS

436.101, and no longer exists under Kentucky Law, except as it relates to this appeal.

There authority for the view that this Court should not consider the constitutionality of a statute in the abstract. *United States v. Raines, supra.* Particularly should this be so where the statute, because of repeal, is inoperative and will have no application in the future.

This, being a review of a jury trial in a state court, involves rights arising out of the Seventh Amendment which accords special importance to jury determinations. In such cases this Court will review the findings to analyze the facts in order to pass upon the Federal Question. *New York Times Co. v. Sullivan,* 376 U.S. 254, 11 L. Ed. 2d 686, 710, 84 S. Ct. 710 (Mar. 9, 1964).

Assuming that this Court sustains the scienter provisions as being within constitutional limitations, the remaining question relates to the standards and criteria to be followed in applying the law to the facts. We believe the function of the court in this event to be similar to that stated by Justice Brennan in his dissent in *Kingsley Books Inc. v. Brown,* 354 U.S. 436, 448, 1 L. Ed. 2d 1469, 77 S. Ct. 1325 (June 24, 1957).

> "Of course, as with jury questions generally, the trial judge must initially determine that there is a jury question, i.e., that reasonable men may differ whether the material is obscene."

See A.L.I. Model Penal Code 207.10 (1957 draft) Reporters Comments p. 16; *United States v. Kennerley,* 209 Fed. 119, 120 (S.D. N.Y. 1913)

> "The same question arises as would arise upon motion to direct a verdict at the close of the case."

To say that obscenity is *primarily* a question of fact for the jury and that under the Seventh Amendment such

facts are not reviewable, is not to suggest, that in every instance such is the case. On the contrary, the Court has its proper role, as does the jury. As the jury may sometimes overstep its bounds *United States v. Dennett,* 39 F. 2d 564, so also may a lower court. *People v. Birch All State News et al.,* 269 N.Y.S. 2d 752, 754 (May 2, 1966) reversing 40 Misc. 2d, 626, 243 N.Y.S. 2d 525 (Sept. 6, 1963).

The division of responsibility and the role which the Court plays, in practice, may in some cases appear difficult of statement. Perhaps the best statement is that of Justice Brennan at the end of the arguments in the *Fanny Hill* case on Dec. 8, 1965: "In other words, we are not making a judgment as experts of literature or prurient interest or anything else, but experts in the application of the constitutional test." We envision the test as a simple one. Is the defendant "pandering," (viewed objectively), or is he "speaking"?

We think there is little doubt from the exhibits in this case that "pandering" (objectively) is involved and take issue with petitioner's claim to the contrary. An examination of the materials at a quick glance, reproduced in the appendix herein, sufficiently demonstrates this quality. The summary of the testimony given during the *Commonwealth's* case in chief, appearing herein, in the Statement of Facts confirms what the pictures show at a glance.

Having satisfied itself that "free speech" is not involved, it would appear that a "sufficient evidence" standard of evidence should suffice. *Jacobellis v. Ohio,* 378 U.S. 184, 12 L. Ed. 2d 793, 84 S. Ct. 1676 (June 22, 1964) Justice Warren dissenting.

A word need be said about the "recklessness" of the petitioner's action. It is defying reason to say that petitioner does not know the products he is distributing. His many years of involvement in the distribution business mark him as an expert in the area. *He is no neophyte.* The reputation of *All State News* is well known in the trade *People v. Birch, All State News et al. supra, Com. v. James J. Onorato,* 2 Conn. Cir. 428, 199 A. 2d 715, 718, as is Spree Magazine. See *New Jersey v. Hudson County News Co.,* 41 N.J. 247, 196 A. 2d 225 (Dec. 13, 1963); *Mahon v. Rachleff,* 15 Fla. Supp. 136 (Dec. 17, 1959), aff'd in 124 So. 2d 878 (Nov. 29, 1960); *Commo Pennsylvania v. Levan,* 52 Berks. 160 (Aug. 19, 1960) and *Chobot v. Wisconsin,* 12 Wisc. 2d 110, 106 N.W. 2d 286 (Nov. 29, 1960).

The Independent Distributors throughout the United States have a closely knit trade organization for the easy exchange of information. See Who's Who in Magazine Distribution. Ziff-Davis Publishing Co., Copyright 1960 Library of Congress Card Catalog No. 60-100057. In its amicus brief council for Periodical Distributors Associations Inc. at page 5 suggests criteria for determining scienter and excuse the non-performance of their clients. We submit there is much the distributors could do but they prefer not to. The prosecutor noted in his closing arguments what was wrong with petitioner's "cooperation." He wanted "the magazine" and "the issue" pointed out for his consideration, yet he carried a full assortment of girlie magazines (25-30), most of which appear on the markets with a new issue each month.

It wasn't as though the trade was taken by surprise. The communities have been attacking this problem for years. See *Conn v. Andrews,* 150 Conn. 92, 186 A. 2d 546 (1962); *Monfred v. Maryland,* 226 Md. 312, 173 A. 2d 173 writ of certiorari denied 368 U.S. 953, 82 S. Ct. 395, 7 L. Ed. 2d 386 (Jan. 8, 1962); *Goldstein v. Virginia* writ of certiorari denied 372 U.S. 910; 83 S. Ct. 726, 9 L. Ed. 2d 720 (Feb. 18, 1963); *Chobot v. Wisconsin, supra,* appeal dismissed for want of a federal question; *New Jersey v. Hudson County News,* 41 N.J. 247, 196 A. 2d 225 (1963).

In the 7 years since the *Smith* case, appellate courts have found no difficulty in affirming convictions based on objective knowledge and circumstantial evidence *United States v. Samuel R. Hochman,* 277 F. 2d 631, 633 (June 7, 1960), *certiorari* denied, 364 U.S. 837, 81 S. Ct. 70, 5 L. Ed. 2d 61 (October 10, 1960), rehearing denied, 364 U.S. 906, 81 S. Ct. 231, 5 L. Ed. 2d 199 (November 21, 1960); *California v. Harris,* 192 Cal. App. 2d 887, 893, 13 Cal. Rptr. 642, 646 (May 5, 1961) reversed on other grounds, *In re Harris,* 366 P. 2d 305; *United States v. Roy A. Oakley,* 290 F. 2d 517 (May 24, 1961), *certiorari* denied, 368 U.S. 888, 82 S. Ct. 139, 7 L. Ed. 2d 87 (October 23, 1961), rehearing denied, 368 U.S. 936, 82 S. Ct. 358, 7 L. Ed. 2d 198 (December 4, 1961); *Harold S. Kahm v. United States,* 300 F. 2d 78 (February 9, 1962) *certiorari* denied, 369 U.S. 859, 82 S. Ct. 949, 8 L. Ed. 2d 18 (April 23, 1962); *California v. Williamson,* 207 Cal. App. 2d 839, 845, 24 Cal. Rptr. 734, 738 (Sept. 26, 1962) cert. denied 377 U.S. 994; *New York v. Finkelstein,* 11 N.Y. 2d 300 (1962), *certiorari* denied, 371 U.S. 863 (1962); *Wisconsin v. Chobot,* 12 Wisc. 2d 110, 106 N.W. 2d 286 (November 29, 1960), appeal

dismissed for want of a federal question, 368 U.S. 15, 82 S. Ct. 136, 7 L. Ed. 2d 85 (October 23, 1961), rehearing denied, 368 U.S. 936, 82 S. Ct. 358, 7 L. Ed. 2d 198 (December 4, 1961). See also *Connecticut v. Andrews,* 150 Conn. 103, 186 A. 2d 546, 552 (November 6, 1962); *New Jersey v. Hudson County News Co.,* 41 N.J. 247, 196 A. 2d 225, 231 (December 16, 1963), (reversed on other grounds); *Nebraska v. Jungclaus,* 176 Neb. 641, 126 N.W. 2d 858, 862 (March 13, 1964); *Chicago v. Doe,* 47 App. 2d 460, 197 N.E. 2d 711, 715 (April 2, 1964); *Illinois v. Sikora,* 204 N.E. 2d 768 (January 21, 1965); *Missouri v. Vollmar,* 389 S.W. 2d 20 (March 8, 1965); *Ohio v. Mazes,* .... Ohio St. ..... (July 13, 1966); *California v. Campise,* 51 Cal. Rptr. 815 (May 25, 1966); *California v. Culbertson,* 51 Cal. Rptr. 827 (May 25, 1966).

Conclusion.

The October term 1966 calendar is already topheavy with an unprecedented 20 obscenity cases seeking review of adverse judgments in state and federal courts. Seventeen of the twenty cases seek review of criminal convictions. All but one of the criminal cases involve retailers. In thirteen of the criminal cases, petitioners have raised "scienter" as a grounds for reversal. A broad spectrum of the industry is included in the case Exhibits—8 paperback books, 10 girlie magazines, assorted nudist magazines, 12 bondage books and magazines, 4 girlie motion picture films and assorted photos of semi-nude females in provocative poses. All have one element in common—the type of material involved.

In our view, the "mens rea" of those who furtively distribute photographs and films in "under the cover

operations" with a "Do you want to buy some filthy pictures" or "Do you want to buy some stag (bachelor) films" is indistinguishable from the Times Square Merchant, who touts his wares as "the best on the market," or the neighborhood retailer, petitioner here, who sells stapled girlie magazines loaded with the same photographs in the local drug or liquor store, or the retailer, who under the subterfuge that he has other aims in mind, peddles the modern nudist magazine "which shows more." Nor does the *modus operandi* become more acceptable to government by suggesting, in retrospect, that any photo or edition would have been removed from the market had the photo or edition been identified as "objectionable." All such conduct is "reckless." The suppliers, not the "vigilantes" are at fault.

The judgment below should be affirmed.

Respectfully submitted,

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